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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,

Petitioners,

v.

BOWMAN TRANSPORTATION COMPANY, INC., et al.,

Respondents.

BRIEF FOR PETITIONERS

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HAROLD FRANKS and JOHNNIE LEE,

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v.

BOWMAN TRANSPORTATION COMPANY, INC., et al.,

Respondents.

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit denying the relief here sought is reported at 495 F.2d 398 (Pet. A1-A41).[1] The order of the Court of Appeals denying rehearing is reported at 500 F.2d 1184 (Pet. A44). The opinion, order and decree, and judgment of the district court, which are not officially reported, appear at 5 EPD ¶ 8497 (Pet. A45-A70).

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Fifth Circuit was entered June 3, 1974

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[1] References in this form are to the Appendix to the Petition for a Writ of Certiorari.

(Pet. A42). The Court of Appeals denied Petitioners' timely petition for rehearing on September 12, 1974 (Pet. A44). The Petition for a Writ of Certiorari was filed on December 10, 1974 and was granted on March 24, 1975.

Statutory Provisions Involved

The pertinent sections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended, provide:

Section 703(a), 42 U.S.C. § 2000e-2(a):

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c), 42 U.S.C. § 2000e-2(c):

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin.

Section 703(h), 42 U.S.C. § 2000e-2(h):

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

Section 706(g), 42 U.S.C. § 2000e-5(g):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other

equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

The Civil Rights Act of 1866, 42 U.S.C. § 1981, provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Question Presented

1. Whether in an action based on Title VII the district courts are prohibited as a matter of law from granting, as part of the remedy to black job applicants unlawfully refused employment, the full seniority they would have obtained but for the employer's discrimination?

2. Whether in an action based on 42 U.S.C. §1981 the district courts are prohibited as a matter of law from granting, as part of the remedy to black job applicants unlawfully refused employment, the full seniority they would have obtained but for the employer's discrimination?

Statement of the Case

This case brings before the Court a pair of related issues from a case that originally raised a broad spectrum of questions correctly answered by the lower courts.[2] At stake is the vitality of the federal courts' power to remedy unlawful employment discrimination.

Petitioners are two black workers formerly employed by Respondent Bowman Transportation Company (hereinafter "Bowman" or "Company") and formerly members of the predecessors of Respondent United Steelworkers of America, International Union of District 50 and its Local No. 13600 (hereinafter "Unions"). Petitioner Franks filed this suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981 as a class action pursuant to Rule 23(b)(1), (2), Fed. R. Civ. P., on May 5, 1971 (4a-12a).[3] Petitioner Lee intervened and filed a similar class action complaint on July 21, 1971 (13a-18a). Franks is a discharged former employee of Bowman in the tire shop of its Atlanta, Georgia terminal (7a-8a); Lee is a truck driver initially refused employment by Bowman but later hired and then discharged (16a). Both complaints charged Bowman with across-the-board practices of racial discrimination in all aspects of employment and alleged that the Unions had collaborated in the discrimination (6a-10a, 14a-16a).

Following trial, the United States District Court for the Northern District of Georgia sustained most of Petitioners'

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[2] The Fifth Circuit resolved a multiplicity of issues in its opinion, generally favorably to Petitioners. Respondent Bowman Transportation Company unsuccessfully sought review of several of those questions. O.T. 1974, No. 74-424, *cert. denied*, 42 L.Ed.2d 644 (December 9, 1974).

[3] Citations in this form are to pages of the Single Appendix filed with this brief.

allegations of racial discrimination. It found that Franks, while employed by Bowman, had been discriminatorily excluded from better and higher paying terminal jobs reserved for whites (Pet. A55-A56); and that Bowman had discriminatorily fired Franks for filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) (Pet. A56). The district court also found that Bowman's initial refusal to hire Lee as a truck driver in January, 1970 was motivated by his race (Pet. A60, A63); but that Lee's subsequent discharge was for cause (Pet. A62-A63). The district court also found that the Company and Union had engaged in a comprehensive program of race discrimination (Pet. A47-A53). Until 1968, Bowman was "almost totally segregated by race," and every department "adhered to strict racial lines" (Pet. A47). In March, 1968, blacks held only two inferior jobs in the shop department—tire man and clean-up—and comprised less than 1% of the total number of employees (Pet. A48-A49). As late as August, 1971, four months after suit was filed, blacks held less than 5% of Bowman's positions and were still almost totally excluded from the higher-paying traditionally white jobs (Pet. A47-A49).[4] The segregated job structure was maintained by a variety of complementary practices of discrimination, including a "lockout" seniority system, a no-transfer rule, and reliance on word-of-mouth

[4] In August, 1971, Bowman's office and clerical staff remained 100% white. The OTR force included about 2% blacks. The City Driver/Dock Department was about 5% black. All 99 mechanics in the Shop Department were white, while blacks filled 21 of the remaining 28 lower-paying Shop jobs. Pet. A48. In terms of pay disparities, blacks made up 2.2% of all workers earning over $225 per week; 2.7% of workers in the Terminal jobs ranging in pay from $172 to $210 per week; and 76.9% of all workers at the lowest pay level, $175 per week. Pet. A48. In 1970 the Atlanta SMSA population was 22.6% black (Bureau of the Census, *1970 Census of Population, General Population Characteristics—Georgia* 12-69 (1970)).

applicant referrals by incumbent employees (Pet. A47, Pet. A49-A52).

The findings and undisputed evidence proved that Bowman followed a conscious policy to exclude blacks from over-the-road (OTR) driver jobs. The district court found that management had, prior to 1970, followed a deliberate policy of not considering blacks for OTR positions (Pet. A50, see 28a-29a). This policy was in effect when Lee first applied and was rejected.[5] Company officials gave as the reason for their policy the fact that the Company did not have any separate truck cabs, shower or bunk facilities available for black drivers and white drivers would not share these facilities with blacks (Pet. A50, 29a, 34a-35a).[6]

[5] When Lee applied, he had nearly 20 years of driving experience, much of it with tractor/trailer rigs similar to Bowman's and much of it over-the-road (R. 1293-R. 1297) (not reproduced in appendix). Lee's application was filed in January, 1970; he was rejected by letter dated February 13, 1970 (R. 1304, Pet. A60). During January-February, 1970, Bowman hired at least 39 white OTRs (Pl. Ex. P-2 [Table IV B], not reproduced in appendix). One exemplary white hiree, J. H. Jarnigan, who applied just as Lee was being rejected, had no truck driving experience, had two speeding tickets and was involved in an accident, in the eight months before Bowman hired him (R. 1370-71).

Sam Crisco, who hired OTRs from 1967 to 1971 (33a), testified as follows (34a):

> THE COURT: During this time [January, 1970] you weren't hiring any blacks out of the Atlanta Terminal, were you?
>
> THE WITNESS: No, sir.

[6] Sam Crisco testified (34a-35a):

> THE COURT: Wasn't everybody saying they were going to put it off as long as they could?
>
> • • • • •
>
> THE WITNESS: We didn't have the facilities for hiring.
>
> THE COURT: You mean in bunk beds and showers?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: All your drivers were telling you every day not to hire anybody [black] and you decided to tough it out as long as you could, isn't that the fact?

(footnote continued)

In response to Lee's EEOC charge and subsequently to this lawsuit Bowman reverted after 1970 to a policy of putting off "as long as could" the hiring of black OTR drivers at its various terminals (Pet. A50, see 35a). Blacks were first hired on September 11, 1970 at Birmingham terminal; on September 12, 1971 at Richmond; on November 21, 1971 at Atlanta; and on February 15, 1972 (the month before trial) at Charlotte (Pet. A50). As a result of the exclusionary policy, Bowman's OTR workforce remained lily-white:

Date	*White OTRs*	*Black OTRs*	*% Blacks*
July 1965	415	0	0
March 1968	464	0	0
August 1971	499	11	2.2
March 1972 (trial)	532	18	3.3

(Pet. A48; Pet. A18 n.11, *cf.* Pet. A50; Defendant's Ex. 76, not reproduced in Appendix.)

THE WITNESS: Yes, sir, we were waiting until we were confronted with it . . . .

Dwight Rice, who hired OTRs from 1959 to 1968 (26a), testified as follows (28a-29a):

Q. What was the driver force when you came?
A. Well, the road drivers were all white.
Q. Did you discuss this matter with anyone else in the Bowman management?
A. I don't think so at that time.
Q. Did you discuss it with them later?
A. I'm sure I have later.
Q. Can you remember who you discussed it with?
A. I'm sure I have discussed it with most of the officers at one time or another.
Q. And what was the nature of your discussion with these officers?
A. Well, due to the fact that we had about 50% double operation in bunkrooms and shower facilities at many of the terminals, and due to the comments of our white drivers, we didn't think it feasible to hire them [black drivers].

Throughout this period, Bowman rejected applications by experienced and apparently qualified black truck drivers. The district court found that a "handful" of blacks had applied prior to 1970.[7] Black applications had become "substantial" in number by 1970 and thereafter continued to increase.[8] Dozens of these applications showed driving records and experience more than sufficient to meet Bowman's standards.[9] Moreover, throughout this period Bowman continued to hire large numbers of inexperienced white trainees on a "buddy system,"[10] as well as a number of white drivers with substandard driving rec-

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[7] The Court must have been referring only to identifiable black applicants whose applications were discovered and placed in the record. Bowman's hiring officials indicated that a substantial number of blacks had applied. Dwight Rice estimated black applicants at one per month until 1968 (29a); Sam Crisco had about one per week after 1967 (36a-37a).

[8] Pet. A50. Bowman rejected more than 200 black OTR applicants in 1970-71 alone, whose application forms were discovered and summarized in the record (52a [Table VA]; Bowman's answers to plaintiff's third interrogatories #1 [not reproduced in Appendix]).

[9] Bowman required that applicants be 25 years old and physically fit, licensed to drive, and preferred a year or at least six months of tractor/trailer driving experience (38a-39a). But see n.10, *infra*. Of black applicants whose written applications are summarized in the record, at least 127 claimed that they met those standards—but were not hired—33 in 1970 and 94 in 1971 (52a [Table VB]). Bowman admits that it verified the claimed experience of 40 of these rejected applicants—15 in 1970, 25 in 1971 (*id.*).

[10] White driver trainees were hired from 1968-1971 without *any* experience requirements (35a). Bowman trained about 75-150 white drivers in this program (*id.*). In order to be hired as a trainee, the candidate had to have a sponsor already on Bowman's all-white OTR contingent (36a). Bowman took referrals from its OTRs and ultimately delegated to them blanket authority to accept or reject candidates (*id.*).

ords.[11] The record makes clear that, absent discrimination, many of the rejected black applicants would have been hired and would have begun to accumulate seniority with Bowman as OTR drivers.[12]

The trial court held the action maintainable as a Rule 23(b)(2) class action, found class-wide discrimination, and granted limited injunctive relief to class members, but denied affirmative relief and back pay (Pet. A53, Pet. A47-A54, Pet. A65-A68). Of particular pertinence here, the court held that Lee could represent a class of black applicants for over-the-road (OTR) truck driver positions who were denied employment prior to January 1, 1972, which it denominated "Class 3" (Pet. A53, Pet. A66-A67), and ordered that individual notice be given to members of that class (Pet. A67, Pet. A70).

The district court ordered that members of "class 3" be granted the right to re-apply for OTR positions, and if found qualified to hiring with priority over all other applicants (Pet. A66-67).[13] However, the court refused to grant blacks hired pursuant to these provisions seniority as OTR drivers retroactive to the date they would

[11] Bowman could not find enough qualified OTRs to keep pace with its high turnover (41a, 27a). To fill its complement of OTRs, Bowman hired some whites with very bad driving records. See, e.g., n.5 *supra*, and Intervenor's Designation of Evidence Relating to Road Driver Hiring, filed during trial, which summarized information in Plaintiff's Exhibit P-1(s) (not reproduced in appendix).

[12] The evidence summarized in notes 10 and 11 shows that there were always OTR vacancies during the period relevant to this suit.

[13] Discovery on remand from the Court of Appeals' decision has shown that a number of previously rejected black applicants were hired when they re-applied pursuant to the decree. In addition a number were shown as not hired for the same reasons frequently given for rejecting black OTR applicants in 1969-1971. Bowman's Answers to Remand Interrogatories, filed May 1, 1975, Nos. 35-37 (N.D. Ga. C.A. No. 15,086).

have been hired but for Bowman's policy of discrimination (Pet. A54). The court grounded its denial of relief on its view that class remedies are beyond the jurisdiction of Title VII courts, as it had previously held in *United States v. Georgia Power Co.*, —— F.Supp. ——, 3 EPD ¶8318 (N.D. Ga. 1971); this reasoning was subsequently reversed, *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973). The district court did not consider the meaning of Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h).

The Fifth Circuit affirmed all the trial court's findings of discrimination and extended those findings to several other practices not held unlawful below (495 F.2d at 409-412, Pet. A15-A20); it also granted Petitioners the affirmative injunctive relief denied them below, including class back pay (495 F.2d at 414-22, Pet. A24-A40).[14] In affirming the district court's finding of OTR hiring discrimination, the Court of Appeals held,

> The record in this case shows that Bowman followed a conscious policy of excluding blacks from its OTR Department until September 1970, a time over five years after the effective date of the Civil Rights Act of 1964.

(495 F.2d at 418, Pet. A31). Despite this clear finding of injury, the Fifth Circuit denied Petitioners' request for full seniority relief to those black applicants who were first discriminatorily rejected and later hired. The appellate court, in affirming on this issue, advanced an entirely different rationale from that of the district court. The Court of Appeals held that Section 703(h) of Title

[14] Bowman filed a petition for a writ of certiorari on the class back pay issue, O.T. 1974, No. 74-424. It was denied December 9, 1974, 42 L.Ed.2d 644. Petition for rehearing was likewise denied March 17, 1975, 43 U.S.L.W. 3501.

VII, 42 U.S.C. § 2000e-2(h), prohibits such relief as a matter of law (495 F.2d at 417-8, Pet. A30-A31). The court reasoned that any seniority system based on hiring dates is "bona fide" and, therefore, protected by Section 703(h) even though practices of racial exclusion may have precluded blacks from hiring. Although Petitioners also prayed for relief under 42 U.S.C. § 1981, the court gave no explanation of why any limitations in the Title VII provision should bar relief under a different statute.

Summary of Argument

I.

A. At Bowman as elsewhere in American industry, seniority is a crucial determinant of employment opportunities. In denying black OTR applicants employment, Bowman also denied them the advantages of seniority. The remedy granted by the district court does not restore class members to their "rightful place" in terms of seniority; they will therefore continue to suffer the effects of past discrimination. The Court of Appeals held that discriminatees could never obtain complete seniority relief from past hiring discrimination. Its decision turns on a wooden interpretation of § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), and is heedless of the facts or equities of the case.

B. Nothing in the terms or context of § 703(h) commands the interpretation given it by the Court of Appeals. The section is not a limitation on Title's VII's remedial provision, § 706(g), 42 U.S.C. § 2000e-5(g). It is, rather, merely a clarification of other sections defining discriminatory employment practices. Section 706(g) was intended as, and is, a sweeping remedial provision, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-5 (1974). There is no basis for reading § 703(h) as an implied limitation on § 706(g).

C. The legislative history of § 703(h) does not support its interpretation to preclude retroactive seniority relief. The statements sometimes cited for that proposition are not the legislative history of § 703(h); in fact they were made several weeks before § 703(h) was conceived and were virtually ignored by Congress thereafter. These statements express no Congressional purpose as to the issue here. They are, like much of Title VII legislative history, inconclusive, and subject to construction in light of the larger statutory purposes.

D. Policy and precedent require a construction of § 703(h) that assures an effective seniority remedy for rejected applicants. The courts are duty-bound to formulate affirmative equitable relief for victims of discrimination, *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). A similar policy assures that victims of discrimination in NLRA cases receive retroactive seniority upon reinstatement, whether from unlawful denial of hiring or unlawful discharge, *Phelps-Dodge Corp.* v. *NLRB*, 313 U.S. 177, 188 (1941). The courts have modified facially neutral seniority systems in a variety of cases under Title VII and other statutes, in order to effectuate public policy. In order to serve the policy favoring effective relief to Title VII discriminatees, this Court should hold that § 703(h) does not strip the district courts of power to grant retroactive seniority remedies. *Meadows* v. *Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975), *cert. filed*, April 25, 1975, O.T. 1974 No. 74-1349; *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F.2d 1038 (3rd Cir. 1973), *vacated and remanded on other grounds*, 414 U.S. 970 (1973).

II.

The court below failed to state any reasons for denying the retroactive seniority remedy under Petitioners' 42 U.S.C. § 1981 cause of action. On its face, the broad language of § 1981 establishes a right to equal seniority rights, and the courts should enforce those rights with appropriate retroactive seniority remedies. Section 703(h) should not be construed as an implied limitation on the scope of § 1981 remedies. The two statutes provide separate and independent remedial schemes, *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 47-49. Even if, because of § 703(h), retroactive seniority were barred under Title VII, Congress did not express any intention to repeal the similar remedy under § 1981, and a finding of repeal by implication is unwarranted. Rather, as in *Jones* v. *Mayer Co.,* 392 U.S. 409 (1968), the Court should hold that enactment of the recent Civil Rights Acts did not diminish the force of earlier measures. The anomalies inherent either in inconsistent interpretations of Title VII and § 1981 or in a finding of partial repeal of § 1981 by implication provide further reason to reject the Fifth Circuit's construction of § 703(h).

ARGUMENT

I.

Section 703(h) Does Not Prohibit an Award of Retroactive Seniority to Discriminatorily Rejected Job Applicants as Part of Their Title VII Remedy.

A. *The Court of Appeals Formulated a Rule That Would Bar Complete Seniority Relief to Discriminatees Without Regard to the Circumstances or Equities of the Case.*

1. The Inadequacy of Seniority Relief Granted Below.

Employment opportunities for Bowman's truck drivers, as for other workers, depend on their seniority.[15] Bowman employees' seniority runs from their date of hire[16] and is departmental in nature (46a, 48a). Seniority standing determines the order of layoff and recall of qualified em-

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[15] In many industries, a worker's seniority is crucial. Seniority typically determines his opportunities for promotion or transfer to a better job, his choice of shifts or assignments, his right to overtime, pension, vacation rights, and other benefits and privileges of employment. It may likewise determine his degree of job security—protection from demotion due to reduction-in-force and from layoff, his level of support while out of work, and his priority for recall or reinstatement. Seniority in the American labor-management relations system is usually measured by or with relation to the worker's date of employment in a company, plant, department, unit, or job. Thus, the amount or date of applicable seniority is often a critical determinant of an employee's job status and future prospects. For most employees, the basic seniority date is simply the date of hire. Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights,* 75 HARV. L. REV. 1532, 1534-5 (1962); Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598, 1601-02 (1969); Bureau of National Affairs, *Labor Relations Yearbook* 45-48 (1971) ("Basic Contract Patterns: Seniority—Layoff, Promotion, Transfer").

[16] A hiree establishes seniority only upon completion of a 45 day probationary period. When he does, however, it runs retroactively from date of employment (47a, 49a).

ployees (*id.*). Regular job assignments or "runs" for over-the-road drivers are posted for bidding, and seniority decides competition between qualified bidders (*id.*). Since OTRs are paid on a per-mile basis, their earnings depend on which runs they can obtain by bidding.[17] Company seniority, rather than departmental seniority, determines the extent of a Bowman employee's vacation (48a, 51a) and pension benefits.[18] The seniority date carried by a Bowman OTR driver is therefore crucial to his securing the benefits of his job.

Black OTR applicants discriminatorily rejected by Bowman were thereby deprived of more than a job. They also lost the opportunity and right to begin accumulating seniority that would provide them security from layoff or reduction in work, and ability to compete successfully for desirable or lucrative assignments. They were further prevented from accruing vacation and pension benefits dependent upon length of tenure in the job. Although the district court's decree (affirmed in this respect by the Court of Appeals) purported to restore to Class 3 members the job opportunities previously denied them, it made no effort to restore the seniority rights of which they had also been deprived.

For a worker whose employment date (and therefore his seniority status) is adversely affected by prior hiring discrimination, simple reinstatement to the job with seniority from date of actual hire cannot fully cure the injury done to him. Even after reinstatement as a "new" employee, he carries a badge of inferiority—his inferior

[17] See Bowman's answers to plaintiff's first interrogatories, #10 (d); Bowman's answers to plaintiff's second interrogatories, #3 and #4 (not reproduced in Appendix).

[18] Bowman's answer to plaintiff's first interrogatories, #30 (not reproduced in Appendix).

amount of seniority. Bowman's belated hiring of Class 3 members here pursuant to the district court's decree or otherwise does not return them to their "rightful place." [19] Instead of seniority dates in 1969 or 1970 or 1971, which they would have obtained had Bowman accepted their initial applications, qualified Class 3 members who re-applied now carry (or should carry, under the doctrine employed below) seniority dates of July, 1972 or later.[20] A black OTR who was a Class 3 discriminatee will always have less seniority than all other OTRs who applied *after* the class member's discriminatory rejection but were hired *before* his reinstatement. Likewise, the rejected applicant will lag behind his (nearly all white) contemporaries in fringe benefits as well as competitive standing. The sole cause of this continuing subordination of the rights of Class 3 black OTRs to those of later-applying whites is of course Bowman's pre-1972 discriminatory hiring policy.[21] Cf. *Griggs* v. *Duke Power Co.*, 420 F.2d 1225, 1230-1, 1236 (4th Cir. 1970), rev'd on other grounds 401 U.S. 424 (1971). Class 3 members will suffer ongoing

[19] See, e.g., Local 189 *United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1268 (1967).

[20] See n.13, *supra*. Due to Bowman's high turnover, a year or two of difference in seniority date can make a significant difference in ability to compete by seniority. For example, on defendant's exhibit 76, the OTR seniority roster as of March 1, 1972 (not reproduced in appendix), 228 names separate the first driver hired in 1970 from the first driver hired in 1972.

[21] All subsequently hired Class 3 OTRs are, of course, qualified under Bowman's usual standards. This makes them presumptively *more* qualified than dozens of white OTRs hired as trainees under Bowman's racist "buddy" system, see notes 9, 10, *supra*. Yet those whites who owe their jobs to Bowman's commitment to maintaining a lily-white OTR force at all costs, see notes 10, 11, *supra*, will continue to have priority ahead of black OTRs who applied before them.

injury, and other employees will continue to enjoy advantages gained at the expense of victims of discrimination, as long as any former rejected applicants remain in OTR jobs.

2. The Court of Appeals Holding.

In affirming the denial of seniority relief to rejected OTR applicants, the Court of Appeals did not discuss the impact of its ruling on affected employees in this case. Instead, the Fifth Circuit held that Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), precludes the courts from awarding *any* seniority relief to previously rejected applicants like Class 3 members. Calling the relief sought by plaintiffs "constructive seniority" and characterizing it as "a giant step beyond permitting job competition on the basis of company seniority" (495 F.2d at 417, Pet. A29-A30), the Court found it barred by § 703(h) as construed in dictum in an earlier decision, *Local 189, United Papermakers & Paperworkers* v. *United States,* 416 F.2d 980, 995 (5th Cir. 1969), *cert. denied* 397 U.S. 919 (1970). The Court held that a seniority system based on date of actual employment is by definition a "bona fide seniority system" within the meaning of § 703(h), and concluded that awards of retroactive seniority under such a system are beyond the remedial power of the courts (495 F.2d at 417-8, Pet. A30-A31).

The Fifth Circuit's holding is a judge-made rule limiting Title VII remedies.[22] The decision below articulates an across-the-board rule of law cutting across all factual situations and substituting for the usual play of the equities. Thus, under the rule announced below, rejected applicants

[22] Nothing in the statute explicitly requires imposition of such a limitation see part B, *infra.* Nor does anything in its legislative history command the courts to construe the statute in the manner chosen by the Fifth Circuit, see part C, *infra.*

in *every* case would be barred from full seniority relief for *any* purpose.[23] The circumstances of the discriminatory rejections would not affect application of the undifferentiated rule.[24] Nor would the result be affected by consideration of whether the burden of the remedy fell on discriminatory employers or unions, on other employees who had benefited from the discrimination, or on mere bystanders. The holding below, if adopted here, would condemn all possible cases to a single result.

The Sixth Circuit faced a similar issue in *Meadows* v. *Ford Motor Company,* 510 F.2d 939 (6th Cir. 1975), *cert. filed* April 25, 1975, O.T. 1974 No. 74-1349, but reached a very different result. See discussion at p. 38, *infra.* In *Meadows* the court was particularly concerned with the consequences of granting retroactive seniority in an economic situation requiring layoffs.[25] The court's opinion, which rejects the result in the instant case below, 510 F.2d at 949, acknowledges the complexity of factors bearing on the issue and abjures a flat rule. It remands the case to the district court for development and possible reconciliation of the conflicting factors and the equities, noting that "[w]e

[23] Discriminatees could not seek a remedy allowing competitive use of retroactive seniority to bid for promotions or job assignments, or to resist demotion or layoff; nor could they obtain the full non-competitive fringe benefits of seniority, such as vacation or pension rights.

[24] Among the varying circumstances deemed immaterial by the Fifth Circuit are whether the rejected applicants applied individually or in writing; whether they were rejected before or after Title VII became effective; whether their applications fell within the statute of limitations period applicable to the action; and whether vacancies existed when they applied.

[25] *Meadows,* like the instant action, was not a layoff case but a refusal-to-hire claim. The court's concern in *Meadows* may have been prompted by the severe and well-publicized production cutbacks and employee layoffs in the automobile industry during the winter of 1974-5.

do not assume, as our brethren in the Fifth Circuit appear to . . . that such reconciliation is impossible," *id.* (citations omitted). The carefulness of the Sixth Circuit's treatment of a similar issue serves to highlight the broad-brush approach taken in this case.

B. *Neither the Language of § 703(h) Nor Its Place in the Statutory Scheme Justifies the Construction Adopted Below.*

Section 703(h), 42 U.S.C. § 2000e-2(h), provides in pertinent part:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . . .

This provision is one subsection of Section 703 of Title VII, which defines what are (§§ 703(a)-(d), 42 U.S.C. §§ 2000e-2(a)-(d), and are not (§§ 703(e)-(j), 42 U.S.C. §§ 2000e-2(e)-(j), employment practices made unlawful by the Act. Section 703(h) does not by its terms or statutory context state anything about the nature or scope of judicial power to remedy such practices. On its face, the pertinent clause of § 703(h) simply states that an employer does not discriminate by using a "bona fide seniority or merit system." Neither in that section nor in any other part of the Title VII did Congress define what it meant to include under the umbrella of a "bona fide" seniority system.[26] Other clauses of § 703(h) exempt from Title VII's prohibitions an employer's use of "a system

[26] Nor does the legislative history contain any specification of exact meaning, see pp. 24-29, *infra*.

which measures earnings by quantity or quality of production," different compensation or employment conditions for "employees who work in different locations," or the use of "any professionally developed ability test."[27] All these authorizations are subject to the section's caveat against otherwise lawful practices that are "the result of an intention to discriminate because of race, color, religion, sex, or national origin."

Section 703(h) must be read in light of the broad prohibitions of §§ 703(a), (c), 42 U.S.C. §§ 2000e-2(a), (c). Those provisions generally define unlawful employment practices by employers and unions respectively, and are cast in sweeping and inclusive terms. Their broad language would appear to prohibit *any* discriminatory employment practice by a subject entity, unless it is specifically authorized elsewhere.[28] Section 703(h) is therefore a clarification or qualification of §§ 703(a), (c) —that is, a clarification of which employer and union practices Congress meant to prohibit and which to permit.

Section 703(h) is not part of the remedial scheme of Title VII. Judicial remedies under the Act are set out in § 706(f)-(k), 42 U.S.C. §§ 2000e-5(f)-(k), and particularly in § 706(g), 42 U.S.C. § 2000e-5(g).[29] Section 706(g) is as broad in its grant of remedial power to the district courts

[27] See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, O.T. 1974 Nos. 74-389, -428, argued April 14, 1975.

[28] See, e.g., *Local 189, United Papermakers and Paperworkers* v. *United States, supra*, 416 F.2d at 982; *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 354 (5th Cir. 1972); *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 429-31 (1971).

[29] The Court is now weighing the proper construction of this subsection in another context, *Albemarle Paper Co.* v. *Moody, supra*.

as §§ 703(a) and (c) are in their definition of unlawful practices. It authorizes the award, upon a finding of liability, of "such affirmative action as may be appropriate," including but not limited to "reinstatement or hiring of employees, with or without back pay . . . *or any other equitable relief as the court deems appropriate*" (emphasis supplied).

Congress intended § 706(g) to give district courts plenary power to fashion complete relief appropriate to the facts of each case. It clarified and reiterated that intention in passing the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972), which reenacted § 706(g) (with modifications not material here). The Section-by-Section analysis prepared by the Senate-House Conference Committee states of § 706(g):

> The provisions of this subsection are intended to give the court *wide discretion exercising their equitable powers to fashion the most complete relief possible.* In dealing with the present section 706(g) the courts have stressed that *the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole,* and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.* 118 Cong. Rec. 7168 (1972); see also 118 Cong. Rec. 4942 (1972) (emphasis supplied).

This Court has previously noted the broad sweep of § 706(g) and the Congressional purpose underlying it, *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 44-5. Nowhere, in the language or structure of Title VII, did

Congress indicate that § 703(h) was to be construed as a limitation on the grant of authority contained in § 706(g).

The construction given § 703(h) by the Court of Appeals in effect reads its definitional limitations into § 706 (g)'s remedial authorization. Although it thereby treated the separate subsections as a unit, the court below made no effort to discuss the terms of § 706(g) or reconcile them with the meaning it found in § 703(h). This Court's and Congress's understanding of the clear meaning of § 706(g) cannot be reconciled with the Court of Appeals' interpretation of § 703(h).

C. *The Legislative History of Section 703(h) Does Not Support the Construction of the Court Below.*

The Fifth Circuit's decision strips the district courts of their traditional power to devise effective equitable remedies appropriate to the circumstances of each case—a power that is particularly crucial in civil rights litigation —by its reading of §703(h). Such a statutory construction should not be adopted in the absence of clear indications that Congress intended to impose a limitation on relief which is nowhere expressed in the statute's terms and is on its face inconsistent with Title VII's broad remedial purpose. The legsilative history[29a] provides no basis for the limiting construction of § 703(h). In construing the section to bar retroactive seniority, the Court of Appeals did not rely on, or even refer to, its sparse legislative history. However, other courts have carefully examined the legislative history of Title VII in ruling on closely related issues —and have arrived at opposite conclusions.[30] As these

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[29a] The judicial search for the meaning of statutory provisions leads first to the text of the statute and then to its purpose, it is primarily as an aid to deciphering an unclear or disputed purpose that the courts look to legislative history. Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 535-44 (1947).

[30] Compare, *e.g., Waters* v. *Wisconsin Steel Works of International Harvester Co.,* 502 F.2d 1309, 1317-20 (7th Cir. 1974),

diverse results indicate, the legislative history of § 703(h) does not on its face clearly reveal any Congressional intention with respect to the question presented.

The bill that eventually became Title VII[31] did not, as initially introduced, contain § 703(h), its language, or indeed any limiting provision on seniority. On the contrary, a dissenting minority of the House Judiciary Committee, which reported the bill out with favorable recommendation, argued that the bill would destroy all seniority systems.[32] The bill's proponents made no effort to refute these state-

cert. filed February 21, 1975, O.T. 1974 No. 74-1064 (legislative history found "supportive" of Fifth Circuit's construction, 502 F.2d at 1318); and *Jersey Central Power & Light Co.* v. *Local Union 327 et al.*, 508 F.2d 687, 706-10 (3rd Cir. 1975) (Congress "intended" the Fifth Circuit's result, 508 F.2d at 706); with *Watkins* v. *United Steel Workers of America, Local No. 2369*, 369 F. Supp. 1221, 1227-29 (E.D. La. 1974), appeal docketed 5th Cir. No. 74-2604 (June 17, 1974) (legislative materials found unpersuasive in contravening plain statutory language prohibiting seniority discrimination). *Meadows* v. *Ford Motor Co., supra*, which rejects the holding in this case below, does not discuss the history of § 703(h), but relies on the related history of § 706(g) discussed at p. 22, *supra*, as "illuminating," see 510 F.2d at 942-3, 949.

[31] H.R. 7152 (1963), see H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

[32] The minority protested that,

> If the proposed legislation is enacted, the President of the United States and his appointees—particularly the Attorney General—would be granted the power to seriously impair . . . the seniority rights of employees in corporate and other employment [and] the seniority rights of labor union members within their locals and in their apprenticeship program. . . .
>
> *The provisions of this act grant the power to destroy union seniority.* . . . with the full statutory powers granted by this bill, *the extent of actions which would be taken to destroy the seniority system is unknown* and unknowable. H. Rep. No. 914, 88th Cong., 1st Sess. 64-66, 71-72 (emphasis supplied).

See also, 110 Cong. Rec. 2726 (1964) (remarks of Rep. Dowdy).

ments. An amendment to exempt from Title VII's proscriptions all employment practices based on a seniority system was defeated on the House floor.[33] The bill passed the House without any seniority provision, 110 Cong. Rec. 2804 (1964), and went directly to the Senate floor where it was extensively debated in the course of a prolonged filibuster. There the bill's co-sponsor, Senator Clark, placed in the record on April 8, 1964, three documents commenting on the bill's effect upon seniority rights. At the time of these insertions, the bill still contained neither § 703(h) nor any specific seniority language. The three documents are an Interpretative Memorandum prepared by the Department of Justice, 110 Cong. Rec. 7206-07,[34] the "Clark-Case Interpretative Memorandum," 110 Cong. Rec. 7212-15,[35] and a set of prepared answers by Senator Clark to

[33] The proposed amendment provided "[t]he provisions of this title shall not be applicable to any employer whose hiring and employment practices are pursuant to (1) a seniority system . . . ." 110 Cong. Rec. 2727 (1964). It was rejected, 110 Cong. Rec. 2728 (1964).

[34] The Department of Justice Memorandum states in pertinent part:

> Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is low man on the totem pole he is not being discriminated against because of his race. 110 Cong. Rec. 7207.

[35] The "Clark-Case Memorandum," states that:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title

questions suggested by Senator Dirksen, 110 Cong. Rec. 7215-17.[36] There was no floor debate or commentary on any of these materials, or of their treatment of the seniority issue, either when they were introduced or thereafter.

The formulation of § 703(h) began some weeks later. The section's language first appeared as part of a substitute "Dirksen-Mansfield" bill, authored by a bipartisan leadership group in order to break the filibuster by vote of cloture, see 110 Cong. Rec. 12706-07 (1964). The substitute was introduced by Senator Dirksen on May 26, 1964, 110 Cong. Rec. 11,926, 11,930-34, and presented by Senator Humphrey on June 4, 1964, 110 Cong. Rec. 12,708-09, 12,721-

comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired to give them special seniority rights at the expense of the white workers hired earler. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.) 110 Cong. Rec. 7213.

[36] Two of the prepared responses are pertinent to the question here.

> Question. Would the same situation prevail in respect to promotions when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires that they be first fired and the remaining employees are white?
>
> Answer. Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race. 110 Cong. Rec. 7217.
>
> • • •
>
> "Question. If an employer is directed to abolish his employment list because of seniority discrimination, what happens to seniority?
>
> Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists."

22. It replaced the Clark bill in its entirety and modified it substantially.[37] Section 703(h) appeared in its final form in the substitute bill, see 110 Cong. Rec. 12,813 (1964). Senator Humphrey, in explaining the addition of § 703(h), merely reiterated its terms and commented, "[t]he change does not narrow application of the title, but merely clarifies its present intent and effect," 110 Cong. Rec. 12,723 (1964). The other principal author of the substitute measure, Senator Dirksen, did not explain the new section except by briefly repeating its terms in conclusory fashion, 110 Cong. Rec. 12,818-19 (1974). No other Senator, including Senators Clark and Case, attempted to debate or amend (or even discussed) § 703(h) before final passage of Title VII. After the Senate passed the Mansfield-Dirksen substitute and just before House passage, the bill's House Manager, Rep. Celler, explained the changes made in H.R. 7152 by the substitute Title VII measure, 110 Cong. Rec. 15,896 (1964). Although he noted a number of trivial changes,[38] as well as significant modifications including the provision of § 703(h) permitting non-discriminatory ability tests, Rep. Celler did not mention its "bona fide seniority system" language, *id.* After final passage of Title VII, Rep.

[37] The Senatorial deadlock that produced the substitute was not to any significant extent over seniority. The proscriptions on employment discrimination contained in the Title VII bill were merely one part of an historic omnibus bill which also had controversial titles prohibiting, *inter alia*, discrimination in public accommodations (Title II, see 42 U.S.C. §§ 2000a *et seq.*) and in federally-assisted programs including public and private schools (Title VI, see 42 U.S.C. §§ 2000d *et seq.*). Even limiting the analysis to Title VII provisions, the critical issue was not over seniority but whether EEOC should have any enforcement powers and if so of what nature ("cease-and-desist" or right to sue in federal court). See, e.g., 110 Cong. Rec. 12,721-22 (1964) (remarks of Senator Humphrey).

[38] Among the minor revisions Rep. Celler called to the attention of House members were the deletion of a section exempting discrimination against atheists, an exemption for Indian-owned corporations, and the application of the Hatch Act to EEOC employees. 110 Cong. Rec. 15,896 (1964).

McCullough, "who had much to do with the passage and also the preparation of the civil rights bill," 110 Cong. Rec. 15,998 (1964) (remarks of Sen. Dirksen), prepared a comparative analysis of the original House-passed bill and the final Senate version. That analysis notes that the House version lacked any § 703(h) provision, but describes the Senate-added section solely as authorizing use of professionally developed ability tests, 110 Cong. Rec. 16,002 (1964). Senator Dirksen, introducing this analysis to the Senate, described it as "highly informative," 110 Cong. Rec. 15,998 (1964).

Reliance on the three undebated Clark memoranda as expressing the legislative purpose of § 703(h) is unwarranted. The memoranda were inserted in the record weeks before § 703(h) was conceived. None of the substitute's architects, nor indeed any other Congressman, drew any specific link between the memoranda and the section. The Senators principally responsible for Title VII as enacted, including § 703(h), stated that it was not designed to change or narrow the Act's prohibitions. The Representatives most knowledgeable and concerned about the House bill, which had overruled the strong protests of some members in rejecting any seniority limitations, did not advise the House that any change had been made in its position by the Senate version. In order to sustain the Fifth Circuit's reading of § 703(h) as imposing a severe restriction on the application of Title VII to seniority systems, it would be necessary to assume that the Congressmen most intimately involved in Title VII's final enactment either were unaware of the secret meaning of the section, or chose to conceal it from their colleagues.[38a]

[38a] To adopt that assumption "would be like sanctioning the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it'." *Screws* v. *United States*, 325 U.S. 91, 96 (1945) (opinion of Mr. Justice Douglas concurring in judgment).

Moreover, the courts have already indicated in a closely related context[39] that they do not take the Clark materials at face value to define the content of § 703(h). Read literally, the three insertions would seem to declare Title VII without *any* effect on established seniority rights.[40] Yet the courts have unanimously rejected that notion as inconsistent with the true Congressional purpose.[41] They reason quite simply that a "bona fide" seniority system within the meaning of § 703(h) is one that does not have racially discriminatory effects; those that have such effects are "the result of an intention to discriminate on the basis of race" and are specifically exempted from the qualification of § 703(h).[42] The Clark statements therefore do not express

[39] The context is that of the "job seniority" cases, see p. 35, *infra*.

[40] See, e.g., the following statements:

"Title VII would have no effect on seniority rights existing at the time it takes effect." Department of Justice Interpretative Memorandum, 110 Cong. Rec. 7207 (1964).

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." Clark-Case Interpretative Memorandum, 110 Cong. Rec. 7213 (1964).

"Answer: The bill is not retroactive, and it will not require an employer to change existing seniority lists." Clark-Dirksen responses, 110 Cong. Rec. 7217 (1964).

[41] See, e.g., *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 515-8 (E.D. Va. 1968) ("It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act"); *Local 189, United Papermakers and Paperworkers* v. *United States, supra*, 416 F.2d at 988, 996; *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2nd Cir. 1971); and see *Watkins* v. *United Steel Workers of America, Local No. 2369, supra*, 369 F. Supp. at 1228-9.

[42] *Quarles* v. *Philip Morris, Inc., supra*, 279 F. Supp. at 517; *Local 189, United Papermakers and Paperworkers* v. *United States, supra*, 416 F.2d at 995-6; *United States* v. *Bethlehem Steel Corp., supra*, 446 F.2d at 659.

the will of Congress as to seniority. Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1611-1614 (1969).

Even if the Clark memoranda could be treated as expressing Congressional intentions, their application to the present case (and a wide range of other current Title VII seniority issues) is at best problematical. The materials purport to discuss *only* the issue of what changes would be wrought in seniority by the enactment of Title VII. They do not address the question of remedies available upon a finding of discrimination that has continued after the effective date of the Act. The continuation of Bowman's racial policy of exclusion long after it had been legally condemned, an eventuality not contemplated in the Clark materials on seniority, creates a context in which the application of dubious legislative history to produce remedial restrictions would be particularly inappropriate, cf. *Watson* v. *City of Memphis*, 373 U.S. 526, 529-30 (1963).

There is simply no clear legislative history to support the meaning affixed to § 703(h) by the Fifth Circuit. This conclusion is not surprising; as this and other courts have remarked, Title VII's broad terms and tortured Congressional history often provide faint guidance along the path to specific constructions. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 57.[43] Mr. Justice Frankfurter, analyzing § 8(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), aptly wrote:

[43] In *Local 189, United Papermakers and Paperworkers* v. *United States*, *supra*, 416 F.2d at 987—the decision that the court below purported to follow—the Fifth Circuit noted that "the legislative history of the Title [VII] is singularly uninstructive on seniority rights." See also, *Johnson* v. *Seaboard Air Line R. Co.*, 405 F.2d 645, 649, 651 (4th Cir. 1968), *cert. denied* 394 U.S. 918 (1969); *Miller* v. *International Paper Co.*, 408 F.2d 283, 286 n. 13 (5th Cir. 1969); *Voutsis* v. *Union Carbide Corp.*, 452 F.2d 889, 891-2 (2nd Cir. 1971), *cert. denied* 406 U.S. 918 (1972).

> Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of the events which they summarize.

Phelps-Dodge Corp. v. *N.L.R.B.*, 313 U.S. 177, 185-186 (1941). That remark is equally applicable to Title VII and its § 703, which like § 8(3) is the basic guarantee against discrimination given to individual workers by a major remedial labor law. And a review of the broad context of § 703(h) confirms that Congress did not intend the Fifth Circuit's construction to prevail. See parts B and D, *infra*.

D. *Section 703(h) Should Be Construed in Keeping With National Labor Policy to Permit Remedial Grants of Retroactive Seniority by District Courts.*

Here as in *Griggs* v. *Duke Power Co.*, *supra*, the employer and union are engaged in seniority practices that perpetuate past hiring discrimination, and Petitioners seek a Title VII remedy for those practices. In construing § 703(h) to bar retroactive seniority in all cases, the court below contravened the strong public policy favoring effective seniority remedies for victims of unlawful employment practices. To effectuate that policy, as enunciated and applied in decisions under both Title VII and other federal laws governing labor, this Court should reject the Fifth Circuit's interpretation.

1. Affirmative remedies for civil rights violations.

In Title VII cases as in other civil rights areas, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discrim-

inatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).[44] In keeping with this remedial principle, this Court has recognized that practices racially neutral on their face may become unlawful when they act as impediments to the complete disestablishment of previously overt segregation. *Green* v. *School Board of New Kent County*, 391 U.S. 430, 439-41 (1968) (need to eliminate pattern of school segregation "root and branch" renders "freedom of choice" plan unlawful); *Monroe* v. *Board of Commissioners*, 391 U.S. 450, 459 (1968) ("free transfer" plan unacceptable unless it furthers elimination of prior segregation); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). The Court has therefore approved district courts' broad use of their "historical equitable remedial powers," *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 17 (1971), to provide a complete remedy. Congress has adopted that principle and drafted, in § 706(g), 42 U.S.C. § 2000e-5(g), a remedial provision giving courts plenary power to fulfill their duty, see p. 22, *supra*. In particular Congress has directed that victims of discrimination "be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination," 118 Cong. Rec. 7168 (1972). The circuit courts have consistently recognized the directive "to make the victims of unlawful discrimination whole," *id.*,[45] as a means of assuring *effective* relief to victims of discrimination.[46]

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[44] See also, *Local 53, International Association of Heat and Frost Insulators & Asbestos Workers* v. *Vogler*, 407 F.2d 1047, 1052-3 (5th Cir. 1969).

[45] *United States* v. *Georgia Power Co.*, 474 F.2d 906, 927 (5th Cir. 1973); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719-20 (7th Cir. 1969); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 876 (6th Cir. 1973).

[46] *Vogler* v. *McCarty, Inc.*, 451 F.2d 1236, 1238 (5th Cir. 1971); *Patterson* v. *Newspaper & Mail Deliverers' Union*, —— F.2d ——, 9 EPD ¶10,033 (2nd Cir. 1975); *NAACP* v. *Allen*, 493 F.2d 614, 619 (5th Cir. 1974); *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 629 (2nd Cir. 1974).

In holding that § 703(h) automatically validates all employment-date seniority systems, the Court of Appeals ignored the distinction between facially neutral practices which freeze prior patterns of discrimination, and truly fair practices in an environment untainted by past segregation or practices which actually help to eliminate the effects of past discrimination. The prohibitory construction adopted below converts § 703(h) into an obstacle preventing the courts from fulfilling their duty and the legislative intent that affirmative relief be available to cure racism's lingering effects. Such a construction subverts Title VII's whole purpose.

2. The remedial policy of the NLRA.

The Fifth Circuit's holding would exclude from the courts' arsenal of Title VII powers a remedy both available and routinely awarded in similar actions under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* Practice under the NLRA is particularly pertinent to the Title VII issue here because Congress intended § 706(g) to confer authority similar to that of the NLRA's remedial provision, § 10(c), 29 U.S.C. § 160(c). 110 Cong. Rec. 6549 (1964) (remarks of Senator Humphrey), H.R. Rep. No. 914, 88th Cong. 1st Sess. 112 (1963).[47]

In applying § 10(c), this Court has followed the principle that victims of unlawful labor practices are entitled to reinstatement to the same position they would have held

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[47] See *United States* v. *Georgia Power Co.*, *supra*, 474 F.2d at 921 n. 19; *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 252 (5th Cir. 1974); *Developments in the Law-Employment Discrimination and the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1259 n. 349 (1971).

but for the illegal acts. *N.L.R.B.* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). Any lesser remedy is inadequate because it leaves the employee worse off as a result of the unlawful practice. *Id.; Golden State Bottling Co.* v. *N.L.R.B.*, 414 U.S. 168, 187-8 (1973), *aff'g* 467 F.2d 164, 166 (9th Cir. 1972). In fashioning remedies pursuant to § 10(c) for unlawful hiring practices, the NLRB and the courts have awarded the same relief ordinarily available to unlawfully discharged employees—reinstatement with full seniority to the date of the unlawful act.[48] These decisions are mandated by this Court's holding in *Phelps-Dodge Corp.* v. *N.L.R.B.*, *supra*, 313 at 188:

> Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. . . . To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.

There is no doubt that an employee discriminatorily discharged in violation of Title VII is entitled, as part of his § 706(g) remedy, to reinstatement with retroactive seniority to the date of his unlawful discharge.[49] In its holding

[48] *Atlantic Maintenance Co.* v. *N.L.R.B.*, 305 F.2d 604 (3rd Cir. 1962), *enf'g* 134 NLRB 1328 (1961); *N.L.R.B.* v. *Lamar Creamery Co.*, 246 F.2d 8, 10 (5th Cir. 1957), *enf'g* 115 NLRB 1113 (1956); *N.L.R.B.* v. *Cone Bros. Contracting Co.*, 317 F.2d 3, 7 (5th Cir. 1963).

[49] *Newman* v. *Avco Corp.*, —— F. Supp. ——, 8 EPD ¶9769 (M.D. Tenn. 1974), *granting relief on remand from* 451 F.2d 743 (6th Cir. 1971); *Pettway* v. *American Cast Iron Pipe Co.*, —— F. Supp. ——, 4 EPD ¶7651 (N.D. Ala. 1970), *granting relief on remand from* 411 F.2d 998 (5th Cir. 1969); *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, —— F. Supp. ——, 7 EPD ¶9223 (M.D. Ala. 1974).

here, the Fifth Circuit therefore drove a wedge between relief available under § 706(g) for discriminatory discharge and for discriminatory refusal to hire. That result is not only contrary to the recognition expressed in *Phelps-Dodge* that "discrimination in hiring is twin to discrimination in firing," 313 U.S. at 188; it is also anomalous in that it denies Title VII relief to persons who would be clearly entitled to the same remedy under the NLRA had their rejection been for union activities, instead of race and color. In enacting Title VII, Congress cannot have meant to afford lesser protections for minority citizens than it had granted union members.

3. Modification of seniority systems to implement public policy.

The restriction on seniority relief imposed by the Fifth Circuit is inconsistent with several related lines of decisions which modify seniority systems for reasons of public policy. In cases involving "job seniority" or "department seniority" systems against a backdrop of historical discrimination the courts have consistently ordered substitution of "company" (employment date) seniority as a remedial measure.[50] These decisions measure seniority by employment date not because that standard is necessarily lawful, but because in the circumstances of those cases it gave meaningful relief from the effects of past discrimination against a class of incumbent employees. The court below incorrectly read this line of decisions as requiring

[50] Indeed, the instant case presented this same issue, and the Court of Appeals resolved it in plaintiffs' favor, 495 F.2d at 414-7, Pet. A24-A29. See also, *Local 189, United Papermakers and Paperworkers* v. *United States, supra; United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 448-55 (5th Cir. 1971); *Robinson* v. *Lorillard Corp., supra; United States* v. *Chesapeake & Ohio R. Co.*, 471 F.2d 582, 587-94 (4th Cir. 1973), *cert. denied* 411 U.S. 939 (1973); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 361-6 (8th Cir. 1973); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 875-6 (6th Cir. 1973).

adherence to "company" seniority in cases involving rejected job applicants, 495 F.2d at 417-8, Pet. A30. The same remedial principle on the facts of this case requires a different seniority remedy for Class 3 members, who were denied any opportunity to work for the Company and thereby to build "company" seniority.[51]

In a series of decisions involving discriminatory union hiring hall and referral practices, the courts have rejected use of employment date seniority as a measure of priority for work.[52] Instead, the courts require referral of black workers even though they lack the seniority that union discrimination prevented them from obtaining. As a result newly-admitted blacks are thereby enabled to compete successfully with whites of much greater actual tenure of membership or employment. The court below held orders permitting such competition impermissible in this case.

As both the departmental-seniority cases and the union-referral cases recognize, effective seniority remedies for persons injured by discrimination inevitably affect the seniority expectations of white workers who may have to compete with them using remedial seniority measures.

> . . . Title VII guarantees that all employees are entitled to the *same* expectations regardless of 'race, color, religion, sex, or national origin.' Where some employees now have lower expectations than their co-workers because of the influence of one of these forbidden factors, they are entitled to have their expectations raised even if the expectations of others must be lowered in order to achieve the statutorily mandated equality of opportunity. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 800 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971).[53]

Seniority expectations have been subjected to modification not only for remedial purposes under Title VII, but also to implement other strong public policies. Under the Selective Training and Service Act of 1940, 50 U.S.C. App. §§ 301 *et seq.*, and the Selective Service Act of 1948, 50 U.S.C. App. §§ 451 *et seq.*, a veteran returning to his former employer must receive seniority credit for time he did *not* work while in the armed forces, 50 U.S.C. App. § 459(c) (1967).[54] And a collective bargaining agreement that gave seniority credit to veterans for periods spent in military service *prior* to initial employment was upheld in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 334-335 nn. 6, 7, 339-340 (1953). In *Huffman* this Court specifically stated that seniority need *not* be defined strictly by "relative length of employment of the respective employees," 345 U.S. at 342,[55] and indicated that different measures of

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[51] See *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972) (employer could not use actual length of employment as factor governing promotions, where effect would be to make previously excluded blacks "once again . . . go to the foot of the line").

[52] *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123, 131 (8th Cir. 1969); *Dobbins* v. *Electrical Workers Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968), *aff'd as later modified sub nom. United States* v. *Local Union 212*, 472 F.2d 634 (6th Cir. 1973); *EEOC* v. *Plumbers Local Union No. 189*, 311 F. Supp. 468, 474-6 (S.D. Ohio 1970), *vac'd on other grounds* 438 F.2d 408 (6th Cir. 1971), *cert. denied* 404 U.S. 832 (1971).

[53] See also, *United States* v. *Bethlehem Steel Corp., supra*, 446 F.2d at 663; *Vogler* v. *McCarty, Inc., supra*, 451 F.2d at 1238.

[54] See also, 5 U.S.C. § 3502(a) (1966) (federal employee receives credit for time spent in military service for purpose of resisting layoff based on length-of-service).

[55] *Accord: Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521, 527 (1949). In both *Huffman* and *Campbell*, the Court construed seniority provisions of a collective bargaining agreement in such a way as to avoid injury to persons whom Congress intended to place in a protected category.

seniority might be used in order to effectuate a variety of public purposes, *id.*, at 338-9.

4. Retroactive seniority serves public policy.

Because of its rigid interpretation of § 703(h), the court below had no occasion to consider whether its holding would effectuate or obstruct the public interest. Two other circuits have sharply disagreed with the Fifth Circuit's approach. In *Meadows* v. *Ford Motor Company, supra,* a class action involving discriminatory refusals to hire on the basis of sex, the court squarely held, "[t]here is, however, no prohibition to be found in the statute which prohibits retroactive seniority," 510 F.2d at 949. While reserving judgment on the application of retroactive seniority to layoff situations, the court specifically noted that its reservation would not apply to fringe benefits dependent on seniority.[56] And in *Jurinko* v. *Edwin L. Wiegand Co.,* 477 F.2d 1038, 1047 (3rd Cir. 1973), *vacated and remanded on other grounds* 414 U.S. 970 (1973), the Third Circuit reversed a district court's refusal to award retroactive seniority to two female job applicants discriminatorily rejected on the basis of sex. The court correctly held,

> We can perceive no basis for the trial court to have refused to award back seniority or for its conclusion that "the plaintiffs are to be offered employment in production with the company, of course, as new employees." Seniority is, of course, of great importance to production workers for it determines both opportunities for job advancement and the order of layoff

[56] "We perceive no reason why that date in these cases should be other than the date which the trial court fixes as the date when the employee would have been hired, absent the illegal hiring practice which the District Court has identified and enjoined," 510 F.2d at 949.

> in the case of a reduction in a company's operating forces. It is our view that the plaintiffs are entitled to seniority and back pay dating from the time of the discriminatory employment practice up to the time they are actually reinstated. Only in this way will the present effects of the past discrimination be eliminated. 477 F.2d at 1046.[57]

It is furthermore the apparent policy of the Department of Justice to seek retroactive seniority as part of the remedy for hiring discrimination in its "pattern-and-practice" cases brought pursuant to 42 U.S.C. § 2000e-6.[58]

Jurinko and *Meadows* correctly perceive the issue as one of policy not predetermined by a clear statutory prohibition. The Fifth Circuit's contrary reading of the statute on narrow grounds cannot be reconciled with this Court's recognition that "national labor policy embodies the principles of non-discrimination as a matter of highest priority," *Emporium Capwell Co.* v. *Western Addition Community Organization,* 43 L. Ed. 2d 12, 25 (1975), *Alexander* v.

[57] On remand from this Court, the Third Circuit reexamined and reaffirmed its initial opinion, —— F.2d ——, 7 EPD ¶9215 (1974). It then remanded the cause to the district court, 497 F.2d 403 (1974). The district court issued the required opinion granting retroactive seniority, —— F. Supp. —— (W.D. Pa. C.A. No. 69-225, November 22, 1974).

[58] See, e.g., *United States* v. *Georgia Power Co.,* —— F. Supp. ——, 7 EPD ¶9167 (N.D. Ga. 1974), *entering decree on remand from* 474 F.2d 906 (5th Cir. 1973); *United States* v. *Roadway Express, Inc.,* C.A. No. C-68-321 (N.D. Ohio September 1, 1970) (consent decree), *aff'd* 457 F.2d 854 (6th Cir. 1972); *United States* v. *Navaho Freight Lines, Inc.,* C.A. No. 72-116-MML (C.D. Cal. January 15, 1973) (supplementary order to consent decree); *United States* v. *Pilot Freight Carriers, Inc.,* C.A. No. C-143-WS-71 (M.D.N.C. October 31, 1972) (consent decree). All of these decrees were obtained prior to the decision below; to our knowledge neither the Department of Justice nor the EEOC has obtained similar relief in a pattern-and-practice action since that decision.

Gardner-Denver Co., supra, 415 U.S. at 47. That policy requires that the district courts should have and exercise the power to grant retroactive seniority as a remedy for exclusionary hiring practices like Bowman's.

II.

The District Courts Have Authority to Grant Retroactive Seniority Relief Under 42 U.S.C. § 1981.

Although the Court of Appeals referred repeatedly in other parts of its opinion to Petitioners' cause of action under 42 U.S.C. § 1981 (see Pet. A8-A9, A39), it made no mention of that section in rejecting the claim for retroactive seniority. Apparently the court assumed that a seniority system held immune under Title VII must necessarily evade the proscription of § 1981.[59] But the terms of § 1981 and its relationship with Title VII, which the court did not analyze, require reversal of its conclusion.

Section 1981 assures black persons the same right "to make and enforce contracts" as white citizens. The Courts of Appeals have unanimously concluded that those protected contract rights include the employment contract with a private employer.[60] Employment under a collective

[59] Cf. *Waters* v. *Wisconsin Steel Works of International Harvester Co., supra,* 502 F.2d at 1320 n.4, wherein the Seventh Circuit disposed of a related § 1981 claim in one sentence: "Having passed scrutiny under the substantive requirements of Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of 42 U.S.C. § 1981."

[60] E.g., *Gresham* v. *Chambers,* 501 F.2d 687, 690-1 (2nd Cir. 1974); *Young* v. *International Telephone & Telegraph Co.,* 438 F.2d 757, 759-60 (3rd Cir. 1971); *Brown* v. *Gaston County Dyeing Machine Co.,* 457 F.2d 1377, 1379 (4th Cir. 1972), *cert. denied* 409 U.S. 982 (1972); *Sanders* v. *Dobbs Houses, Inc.,* 431 F.2d 1097, 1101 (5th Cir. 1970) *cert. denied* 401 U.S. 948 (1971); *Caldwell* v. *National Brewing Co.,* 443 F.2d 1044, 1045 (5th Cir. 1971) *cert. denied* 405 F.2d 916 (1972); *Long* v. *Ford Motor Co.,*

bargaining agreement governing, *inter alia,* seniority is such a contract. Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights, supra,* 75 HARV. L. REV. at 1533-4. The contractual rights secured by the collective bargaining agreement between defendants here include the right of employees to establish seniority on the date of hiring and to accumulate and use it thereafter (see pp. 15-16, *infra*). Enforcement of this contract right necessarily encompasses enforcement of the full rights and benefits of such seniority. If a black person is denied the same right as white citizens to make a contract for seniority, § 1981 requires at least that the courts possess the power to restore to such black person the right "to make and enforce" the contract previously denied him. If courts lacked this power, § 1981 would confer a right without a remedy, a construction that is both inequitable and irrational. Cf. *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 433-4 (1964); *Mitchell* v. *Robert de Mario Jewelry, Inc.,* 361 U.S. 288, 291-2 (1960); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229, 239 (1969) (construing 42 U.S.C. § 1982 to provide a full remedy for racial discrimination).

Section 703(h) of Title VII should not be read to bar a full remedy, which necessarily includes retroactive seniority, under § 1981. Squarely to the contrary, this Court has held,

496 F.2d 500, 503 (6th Cir. 1974); *Waters* v. *Wisconsin Steel Works of International Harvester Co.,* 427 F.2d 476, 481-8 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970); *Brady* v. *Bristol-Myers Co.,* 459 F.2d 621, 623-4 (8th Cir. 1972); *Macklin* v. *Spector Freight Systems, Inc.,* 478 F.2d 979, 993-4 (D.C. Cir. 1973).

This Court has not yet had occasion to rule on the applicability of § 1981 to private employment. But see *Johnson* v. *Railway Express Agency, Inc.,* O.T. 1973 No. 73-1543, argued December 11, 1974.

> ... (L)egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination[7] . . . [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

[7] See, e.g. 42 U.S.C. Section 1981 (Civil Rights Act of 1966); 42 U.S.C. Section 1983 (Civil Rights Act of 1871).

Alexander v. *Gardner-Denver Co., supra,* 415 U.S. at 47-49. The reasoning of *Alexander* endorses both clear legislative history and principles settled in the lower courts. In 1964 and 1972 Congress rejected amendments that would have made Title VII the exclusive judicial remedy for employment discrimination. 110 Cong. Rec. 13650-52 (1964); H. R. Rep. No. 92-238 at p. 79 (1971); S. Rep. No. 92-415 at p. 24 (1971); *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 48 n. 9. Congress thus intended that § 1981 offer a separate and independent remedy from that of Title VII, *id.*

The Courts of Appeals have properly construed these legislative materials to establish § 1981 as a separate and, in significant respects, different grant of remedial authority. In *Guerra* v. *Manchester Terminal Co.,* 498 F.2d 641 (5th Cir. 1974), the Fifth Circuit held that although Title VII does not prohibit discrimination based on alienage,[61] § 1981 does.[62] In *Macklin* v. *Spector Freight Systems, Inc.,* 478 F.2d 979, 996 (D.C. Cir. 1973), the District of Columbia Circuit characterized Title VII and § 1981 as having "radically different schemes of enforcement" and differing "widely in their substantive provisions." The court in *Alpha Portland Cement Co.* v. *Reese,* 507 F.2d 607 (5th Cir. 1975), ruled that § 1981 might authorize class relief where Title VII did not.[63] See also, *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159, 172 (3rd Cir. 1971), *cert. denied* 404 U.S. 854 (1971) (§ 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), companion section to § 703(h), cannot limit remedies based on laws other than Title VII.

[61] See *Espinoza* v. *Farah Manufacturing Co.,* 414 U.S. 86 (1973).

[62] The court in *Guerra* noted that § 1981 expresses "a humane and remedial policy," and stated, "Congress intended Title VII to be an important, but not the only, weapon in the arsenal against employment discrimination," 498 F.2d at 650. It justified holding that § 1981 prohibits some forms of employment discrimination that Title VII does not touch by reasoning that in reconciling the two statutes, the goal must be:

> to mitigate the harshness to those accused of employment discrimination resulting from what one source has characterized as "multiple jeopardy," [footnote omitted] while preserving and protecting for those complaining of discriminatory employment practices the full panoply of remedies guaranteed them by the federal laws.[46]

[46] We emphasize that though Title VII § 1981, and Section 8 of the NLRA may overlap in the area of employment discrimination, their confluence must not be exaggerated. They are separate, independent statutes. The procedures under them vary; the available remedies may differ significantly, and, as the case at bar illustrates, conduct creating liability under one may not create liability under another.

498 F.2d at 658.

[63] The court in *Reese* rejected a policy argument against extension of § 1981 remedies beyond the reach of Title VII, stating:

> Accepting [the employer's] proposition arguendo, the policy choice is one already made by Congress in creating Title VII as a remedy supplemental to and separate from that existent under § 1981. 507 F.2d at 609 (footnote omitted).

To hold that the broad, unqualified language of § 1981 is limited by the narrow terms of § 703(h) (as construed below) would require finding that the later statute repealed or superseded the earlier one as to the seniority issue here. Such repeals by implication are not favored. *Morton* v. *Mancari*, 417 U.S. 535, (1974) (enactment of Title VII did not repeal remedial provisions of existing law); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936) ("the intention of the legislature to repeal must be clear and manifest"); *United States* v. *Borden Co.*, 308 U.S. 188, 198-9 (1939); *United States* v. *Price*, 383 U.S. 787 (1966).[64] Six Courts of Appeals have rejected the proposition that the enactment of Title VII repealed pre-existing remedies under § 1981[65]; no circuit has ruled otherwise. The circuit courts' decisions are mandated by three recent decisions of this Court which refuse to read the detailed civil rights legislation of the 1960's to narrow relief available under the more general post-Civil War acts. *Jones* v. *Mayer Co.*, 392 U.S. 409, 416 n. 20 (1968) ("The Civil Rights Act of 1968 [42 U.S.C. §§ 3601 *et seq.*] does not mention 42 U.S.C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute"); *Sullivan* v.

[64] In *Price* the Court dealt with another post-Civil War enactment to rectify racial injustices (18 U.S.C. § 241) and held that its "plain and unlimited" language should not be restricted. It wrote, in words applicable here,

> We think that history [of events surrounding its enactment] leaves no doubt that, if we are to give [the statute] the scope that its origins dictate, we must accord it a sweep as broad as its language. 383 U.S. at 801.

[65] *Gresham* v. *Chambers*, *supra*, 501 F.2d at 691, *Young* v. *International Telephone and Telegraph Co.*, *supra*, 438 F.2d at 760-3; *Sanders* v. *Dobbs Houses, Inc.*, *supra*, 431 F.2d at 1100-01; *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, *supra*, 427 F.2d at 484-5; *Brady* v. *Bristol Myers Co.*, *supra*, 459 F.2d at 623-4; *Macklin* v. *Spector Freight Systems, Inc.*, *supra*, 478 F.2d at 993-4.

Little Hunting Park, Inc., *supra*, 396 U.S. at 237, 238 (Title II of Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.*, does not supersede provisions of 42 U.S.C. § 1982); cf. *Tillman* v. *Wheaton-Haven Rec. Ass'n.*, 410 U.S. 431 (1973) (rejecting on factual grounds argument that exemption in Title II, 42 U.S.C. § 2000a(e), suits under §§ 1981, 1982).

Title VII's broadly remedial policy, see pp. 21-22, *supra*, makes it particularly inappropriate to read § 703(h) as limiting remedies otherwise available under § 1981. The thrust of Title VII was to eliminate employment discrimination by "supplementing" other remedies, not to cut back on their utility or efficacy, cf. *Morton* v. *Mancari*, *supra*, 417 U.S. at 549-50 (1974).

Like Title VII, the post-Civil War acts were broadly remedial in purpose, *Sullivan* v. *Little Hunting Park*, *supra*, 396 U.S. at 237, and it would violate the spirit of § 1981's enactment to limit its remedial effect, cf. *Phelps-Dodge Corp.* v. *N.L.R.B.*, *supra*, 313 U.S. at 186. Moreover, the extension to § 1981 of any limitations contained in § 703(h) directly contradicts the Congressional understanding that earlier legislation would not be undermined. The construction of § 703(h) by the Fifth Circuit therefore offends the purpose of both statutes as well as the canon against repeals by implication. The manifold problems occasioned by this interpretation can be avoided by simply concluding that § 1981 means what it says, and § 703(h) required no change in that meaning. This Court should hold that the trial court is empowered to grant plaintiffs their remedy of retroactive seniority under 42 U.S.C. § 1981.

CONCLUSION

The issue here, although narrow, has broad implications. The Court must decide only whether by enacting § 703(h) Congress deprived district courts of the statutory and equitable power to grant relief from employment discrimination whenever the relief would entail an award of retroactive seniority to rejected job applicants. The Court need not here decide precisely what forms of relief may be appropriate. That task falls in the first instance to the district courts. Nor does the Court face the question of when such relief is appropriate in a case of any particular type, e.g., a layoff case, a recall case, a promotion case, a hiring case, or a benefits case. Yet if the doctrine announced below becomes law, no complete remedy may be granted in any case of hiring discrimination.

For the reasons stated herein, this Court should hold that § 703(h) does not stand as a barrier to appropriate retroactive seniority relief under Title VII and 42 U.S.C. § 1981. The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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